No. 88-802

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Supreme Court of the United States

OCTOBER TERM, 1988

FREDERICK SMITH, in his individual and official capacity as Principal of the Bradford Area High School; RICHARD MILLER, in his individual and official capacity as assistant principal of the Bradford High School; and FREDERICK SHUEY, in his individual and official capacity as Superintendent of the Bradford Area School District,

Petitioners,

vs.

KATHLEEN STONEKING,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether school administrators who know of and consciously disregard allegations that a particular teacher has sexually assaulted his students are entitled to qualified immunity where their failure to investigate the allegations and to control the teacher result in repeated additional assaults upon students.

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OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Third Circuit is reported at 856 F.2d 594 (1988). The opinion and order of the United States District Court for the Western District of Pennsylvania is reported at 667 F.Supp. 1088 (1987).

STATEMENT OF CASE

Kathleen Stoneking ("Respondent") commenced this action pursuant to 42 U.S.C. §1983 (1982) in the United States District Court for the Western District of Pennsylvania, Case No. 87-63E, against the Bradford Area School District ("School District"), Frederick Smith, the principal of the Bradford Area High School, Richard Miller, the assistant principal, and Frederick Shuey, the superintendent of the School District.

After some discovery, the individual defendants ("Petitioners") moved for summary judgment on the ground, *inter alia*, of qualified immunity. The district court denied the motion. *Stoneking v. Bradford Area School District*, 667 F.Supp. 1088, 1102 (W.D. Pa. 1987). Petitioners appealed the district court's decision to the United States Court of Appeals for the Third Circuit, which affirmed. *Stoneking v. Bradford Area School District*, 856 F.2d 594 (3rd Cir. 1988).

The facts material to the Third Circuit's decision were derived entirely from the pleadings.[1] Respondent

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[1] The Court of Appeals correctly noted that there may be instances where discovery is necessary before a motion for summary judgment on qualified immunity can be resolved but, because the Petitioners had elected to "stand on the pleadings," this was not such a case. *Stoneking*, 856 F.2d at 598.

alleged in her complaint that Petitioners had engaged in a long-standing pattern of active concealment and deliberate indifference to instances of sexual misconduct on the part of teachers in the School District, and that this conduct allowed the Bradford Area High School band director, Edward Wright, to molest Respondent frequently from 1980 to 1983, thus violating her constitutionally protected interest in being free from physical abuse and bodily integrity. (Complaint, ¶¶ 13-16, App. 89-90).

Respondent also alleged that Petitioners had actual knowledge during the period she was molested that Wright and other teachers had sexually abused female students, but suppressed this knowledge and discouraged students from pursuing complaints against Wright and other teachers. (Complaint, ¶¶ 11-19, App. 89-90).

Petitioners' statement of Questions Presented at page i of their brief misstates this portion of the record. Petitioners query whether school administrators have a duty to protect students from sexual assaults by a teacher, "where the [school] district has *no knowledge* of the criminal activity or . . . that a particular individual is at risk." However, the record in the Court of Appeals, which Petitioners adopted for purposes of this appeal, assumed that by 1979 Petitioners had actual notice of the sexual misconduct of Wright and other teachers but continued to permit Wright to function as band director and failed to prevent his subsequent assaults upon Respondent and other students.[2] *Stoneking*, 856 F.2d at 598.

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[2] Petitioners' statement on page 6 of their brief that Wright's misconduct was exposed in March of 1986 is accurate to the extent that it reflects when Wright's misconduct was revealed to the public. However, the statement is misleading in that it

In the proceedings below, the Third Circuit held that (1) individuals have a constitutionally protected liberty interest in being free from sexual abuse in school; and (2) where school officials know that a particular teacher presents a "special danger" to a known and identifiable group of students, the officials have a duty to investigate and take reasonable steps to protect the students and to eliminate rather than condone an atmosphere in which teachers could sexually harass students with impunity. *Stoneking*, 856 F.2d at 603.

The Third Circuit also held that both the right and the duty were "clearly established" in 1979 through 1983, when Respondents were on notice of Wright's abuse of female students. *Id.*

ARGUMENT

A. Summary of Argument.

Petitioners contend that the Third Circuit's opinion below marks a vast and unwarranted expansion of civil liability under section 1983. They argue that school officials have a duty to control an abusive or violent teacher only if they know that the teacher intends to attack a *particular* student. Where, as in the instant case, a particular segment of the student body is at risk, school officials are, according to Petitioners, free to ignore information that the teacher has attacked or abused students in the group at risk in the past and may do so in the future.

The limits of section 1983 liability, however, were not so constrained in 1979 through 1983. The con-

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appears to imply that Petitioners learned of Wright's abuse of students on that date.

stitionally protected right of personal bodily integrity was established no later than 1977, when this court decided *Ingraham v. Wright*, 430 U.S. 651 (1977). The principle that government officials cannot condone or acquiesce in the deprivation of constitionally protected rights by their subordinates has been expressly recognized by every federal court of appeals to address the issue. The duty of school officials to investigate misconduct by teachers and to protect students from known threats of abuse arises from the statutory and common law of Pennsylvania and also from the authority and control school administrators exercise over teachers and students while on school premises or pursuing school related activities.[3]

Notwithstanding Petitioners' assertions to the contrary, this case does not present the same difficult issues addressed in *DeShaney v. Winnebago County*, 812 F.2d 298 (7th Cir. 1987), *cert. granted*, 108 S.Ct. 1218 (1988) and *Estate of Bailey by Oare v. County*

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[3] Petitioners do not challenge the settled proposition that government officials may be held liable under section 1983 for a failure to do what is required as well as for overt activity which is unlawful and harmful. See *Estelle v. Gamble*, 429 U.S. 97 (1976). Nor do Petitioners dispute that Respondent has alleged facts, which, if established at trial, demonstrate deliberate indifference to the rights of students. *See Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986); *Fiacco v. City of Rensselaer*, 783 F.2d 319 (2nd Cir. 1986) (police officials may be liable under section 1983 where their policy of nonsupervision of police officers amounts to deliberate indifference to the use of excessive force by those officers). Instead, Petitioners argue that, unlike police officers who have a duty to supervise and control their subordinates for the benefit of the public, school officials have no duty to supervise and control teachers for the benefit of students.

of York, 768 F.2d 503 (3rd Cir. 1985). Unlike the defendants in *DeShaney* and *Bailey*, Petitioners not only had a statutory and common law duty to at least investigate and report alleged incidents of abuse of school children, Petitioners also had substantial control and supervisory authority over Wright, the perpetrator of the abuse.

Even Judge Posner, the author of the Seventh Circuit decision in *DeShaney*, agrees that government officials whose positions involve supervisory responsibility have a duty to act where they know or should know of the misconduct of their subordinates. *See McKinnon v. City of Berwyn*, 750 F.2d 1383, 1391 (7th Cir. 1984).

The holding of the Third Circuit that school officials have a duty not to pursue a policy of concealment and deliberate indifference to sexual misconduct by teachers and to act where they know that a particular teacher is a threat to an identifiable group of students comports with fundamental principles enunciated by this Court and uniformly recognized by the federal courts of appeals. The position urged by the Petitioners, on the other hand, is unsupported by the precedent of any court and does not merit Supreme Court review.

B. School students have a constitutionally protected liberty interest in being free from sexual abuse in school and school officials have a corresponding constitutional duty not to pursue a policy that results in deprivations of that interest.

The liberty interest in being free from physical abuse in school was established no later than 1977, when this Court held in *Ingraham v. Wright* that "corporal punishment in public schools implicates a

constitutionally protected liberty interest." 430 U.S. 651, 672 (1977). This principle has since been uniformly recognized by the federal courts of appeals that have addressed the issue. *See e.g. Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980); *Garcia v. Miera*, 817 F.2d 650, 656-58 (10th Cir. 1987), *cert. denied*, 108 S.Ct. 1220 (1988).

The Third Circuit held that a student's interest in personal bodily integrity encompassed more than freedom from excessive corporal punishment. The Third Circuit and the district court both noted that "common sense suggests that the right to be free from sexual abuse is at least as fundamental as the right to be free from the less intrusive physical abuse of paddling." *Stoneking*, 856 F.2d at 599 (*quoting Stoneking*, 667 F.Supp. at 1094).

This conclusion is not genuinely disputed even by Petitioners. Instead, they assert that school administrators did not have a "clearly established" affirmative duty to take steps to protect school children from sexual abuse by a staff member. For this proposition, Petitioners rely principally on *Martinez v. California*, 444 U.S. 277 (1981), where the Court held that members of a parole board were not liable under section 1983 for damages caused when a convict they had paroled murdered the plaintiff's decedent. The Court explained that the parolee was "in no sense an agent of the parole board" and that "the parole board was not aware that [plaintiff's] decedent as distinguished from the public at large, faced any special danger." *Id.* at 285. However, the Court did "not decide that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole," but

did "hold that at least under the particular circumstances of this parole decision, [plaintiff's] decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law." *Id.*

As Petitioners note, "[s]ince *Martinez*, the courts of appeals have struggled to define the circumstances under which an affirmative duty to protect will be imposed upon government officials." Petitioners' brief at p. 13. However, not all questions in this area of constitutional law are unsettled. The courts of appeals uniformly agree that government officials with supervisory responsibility may not adopt or promote policies that authorize or condone constitutional deprivations by their subordinates. *See e.g. McKinnon v. City of Berwyn*, 750 F.2d 1383, 1391 (7th Cir. 1984) (police supervisor's negligent selection, supervision or failure to discharge subordinates causally related to their wrongdoing creates liability under section 1983); *McClelland v. Facteau*, 610 F.2d 693, 697 (10th Cir. 1979) (police chiefs have a duty to correct subordinate misconduct of which they have notice); *Sims v. Adams*, 537 F.2d 829, 1831-32 (5th Cir. 1976) (complaint stated cause of action against mayor and chief of police for breach of their duties to control police officer's known propensity for improper use of force); *Fiacco v. City of Rensselar*, 783 F.2d 319 (2d Cir. 1986) (deliberate indifference to misconduct of subordinates creates liability under section 1983), *cert. denied*, 480 U.S. 922 (1987); *Doe v. New York Dept. of Social Services*, 649 F.2d 134, 144-42 (2d Cir. 1981) (foster care officials' failure to supervise subordinates may demonstrate reckless indifference to the rights of foster children giving rise to section 1983 liability).

This principle is based upon decisions of this Court that predate *Martinez*. In *Rizzo v. Goode*, 423 U.S. 362, 371 (1976), this Court explained that "an affirmative link" between the supervisor's own actions and the misconduct of his subordinates is a prerequisite to supervisor liability under section 1983. In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), this Court held that a city is not liable for the acts of a lower echelon employee absent proof of a municipal "policy" that caused the plaintiff's injury.

Both aspects of municipal and supervisor liability are satisfied by the allegations in this case. Petitioners' active concealment and deliberate indifference to sexual misconduct by teachers created a policy that resulted in the deprivation of Respondent's right to be free from sexual abuse. Unlike the governmental action in *Martinez* and *DeShaney*, the actions of Petitioners were not so remote as to create a question of proximate causation. At all relevant times, Petitioners exercised supervisory authority over Wright and authority *in loco parentis* over Respondent.

Petitioners did not merely fail to rescue Respondent from a dangerous third person unrelated to the school district. Petitioners' policy condoning known sexual abuse of students by teachers created the danger to Respondent. The Third Circuit's finding that Petitioners were not entitled to qualified immunity under these circumstances neither expands civil liability under section 1983 as interpreted by this Court in *Martinez* nor conflicts with the decisions of other courts of appeals such as the Seventh Circuit's decision in *DeShaney*.

C. Under the special relationship doctrine, school officials who know that a particular teacher presents a special danger to a known and identifiable group of students have a duty to investigate allegations of abuse and to take reasonable steps to protect the students.

The Third Circuit held that Petitioners had a duty to take affirmative action to investigate and protect students from a teacher's sexual abuse of which they were made aware. Although arising out of similar circumstances, this duty is distinct from Petitioners' duty not to promote policies that deprive students of their right to freedom from sexual abuse. In the present case and in *Estate of Bailey by Oare v. County of York*, 768 F.2d 503 (3d Cir. 1985), the Third Circuit generally embraced the special relationship analysis described in *Jensen v. Conrad*, 747 F.2d 185, 194, n.11 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985).

In *Jensen*, the estate of two children who suffered fatal beatings at the hands of their guardians brought a section 1983 action against South Carolina state social service agencies and various state employed case workers, alleging that the state, acting through its employees, violated the childrens' fourteenth amendment rights by failing to intervene and provide protection. 747 F.2d at 187. Based upon these facts, the court concluded that at the time of the alleged violation a constitutional right of affirmative protection was not clearly established and, therefore, dismissed the action on the grounds of good faith immunity. *Id.*

However, after reviewing case law establishing that in certain circumstances a special relationship between the government and an individual may give rise to an affirmative duty to act, the court enum-

erated "some of the *factors* that should be included in a 'special relationship' analysis." *Id.* at 194, and n.11 (emphasis supplied). Those factors are:

(1) Whether the *victim or perpretrator* was in legal custody at the time of the incident or, had been in legal custody prior to the incident.

(2) Whether the state has expressly stated its desire to provide affirmative protection to a *particular class* or specific individuals.

(3) Whether the state knew of the claimant's plight.

Id. at 194, n.11.

Petitioners have seized upon these factors as if they were items on a mechanic's maintenance checklist rather than "some of the factors" included in a flexible analysis. They assert that this case requires United States Supreme Court review because the Third Circuit has abolished "one prong of the prior 'special relationship' test." Petitioners' brief at p.16 (emphasis supplied). Relying on this Court's decision in *Martinez*, Petitioners assert that a special relationship can exist only if the "public body has prior knowledge of the *identity* of the victim and the victim's particular plight." *Id.*

In *Martinez*, this court refused to create an unworkable, general right of protection in "the public at large." 444 U.S. at 285. However, the Court did not create a rule of law under which governmental officials must control a subordinate where he threatens a *particular* individual but not where he threatens members of a small group. The Third Circuit correctly

noted that Respondent and the other female band members placed at risk by Petitioners' acquiesence in Wright's misconduct were far from unknown and unidentifiable members of the general populous:

> [Respondent's] relationship vis-a-vis her school's principal, assistant principal, and even school district superintendent, is patently not comparable to an unidentified "member of the general public, living in the free society and having no special custodial or *other* relationship" with state parole officials who released a parolee. *See Fox v. Curtis*, 712 F.2d 84, 88 (4th Cir. 1983). Although she was not in a technical sense in defendants' legal "custody" . . . she was a member of a known and identifiable class of potential victims—female students in general, and female band members in particular.

Stoneking, 856 F.2d at 601.

This Court's holding in *Martinez* provides no support for distinguishing between a known threat to a single individual and a known threat to members of a small group. This distinction is similarly unsupported by the decisions of the federal courts of appeals and was properly rejected by the Third Circuit.

Petitioners also argue that the special relationship analysis should end upon a finding that the victim was not technically in legal custody at the time of the attack. However, no court has held that legal custody is required to create a special relationship, and, in *Jensen*, the Fourth Circuit reaffirmed the principle "that a right to affirmative protection need not be limited by a determination that there was a 'cus-

todial relationship.' " 747 F.2d at 194 (citing *Fox v. Curtis*, 712 F.2d 84 (4th Cir. 1983)).

As it has developed in the courts of appeals, the special relationship issue has never turned on custody alone. Rather, a special relationship may be found where, as in the case at bar, the state has played a significant role in creating a specific danger to an individual. In such cases, the state is enough of an "active tortfeasor" to warrant that it be charged with an affirmative duty of protection. *See Jensen*, 747 F.2d at 194. Petitioner's role in creating an atmosphere that condoned sexual abuse of Respondent and other female band members is in many ways more "active" than where the state takes an individual into custody and places her in a position of danger.

Under Pennsylvania law, Respondent was required to attend school. *See* 24 Pa.Stat.Ann. §13-1327 (Purdon Supp. 1988). "Because students are placed in school at the command of the state and are not free to decline to attend, students are in what may be viewed as functional custody of the school authorities, at least at the time they are present." *Stoneking*, 856 F.2d 594. Once placed in school, students must necessarily rely on school officials to control abuse or violence after it comes to light or, at least, to adopt policies that do not allow abusive teachers to prey on students with impunity. While Petitioners are correct that they did not "actually abuse [Respondent] or touch [her] in any way," the line between participation and facilitation is not so bold that their acts and omissions escape the coverage of section 1983.[4]

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[4] The Third Circuit also concluded that the state has expressly stated its desire to provide affirmative protection to students.

In addition to the Fourth Circuit in *Jensen*, the Eleventh Circuit also has expressly recognized the special relationship doctrine. *See Taylor v. Ledbetter*, 818 F.2d 791, 797-98 (11th Cir. 1987). In *Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 510-11 (3d Cir. 1985), the Third Circuit held that once the state is aware of the danger that a particular child may be abused, a special relationship arises between it and the child and places on the state a constitutional duty to protect the child from abuse. In *DeShaney*, although the Seventh Circuit refused to adopt the special relationship doctrine as set forth in *Estate of Bailey*, it was careful to distinguish the facts before it and those of *Estate of Bailey* from cases where the state has placed an individual "in a position of danger . . ." 812 F.2d at 303-304. In the latter cases, the state, the court explained, "cannot shrug off all responsibility when the danger materializes and injury results." *Id.* at 304.

The Seventh Circuit had previously employed this same reasoning in *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979), where it found a due process violation based upon the refusal of police officers to lend aid to children endangered when the officers arrested the

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Stoneking, 856 F.2d at 601-603. In so finding, the court relied on a number of authorities, including the Child Protective Services Law, 11 Pa. Stat. Ann. Section 202 *et seq.*, the statute permitting termination of a teacher's contract for, *inter alia*, "immorality," 24 Pa. Stat. Ann. Section 11-1122 (Purdon 1962); as well as the *in loco parentis* statute, 24 Pa. Stat. Ann. Section 13-1317 (Purdon Supp. 1988). In addition to statutory law, the court also noted that the "duty . . . to protect students from the tortious or criminal conduct of teachers has long been established in the common law." *Id.* at 602 (citing cases and Restatement (Second) of Torts, Section 320 (1965)).

father of the children and left them in an abandoned car on the side of the road. The court stated:

> It is clearly established that although officials may not be held liable for simple negligence, they may be held liable for "gross negligence" or "reckless disregard" for the safety of others. In the case before us the police could not avoid knowing that, absent their assistance, the three children would be subjected to exposure to cold weather and danger from traffic. This indifference in the face of known dangers certainly must constitute gross negligence.

592 F.2d at 385 (footnotes omitted).

Thus, whether grounded on the "special relationship" doctrine adopted by the Third, Fourth, and Eleventh Circuits or the "reckless disregard" of a state created danger concept followed by the Seventh Circuit, the judgment of the Third Circuit below does not depart from clearly established principles of constitutional law.

Nor does the judgment of the court conflict with the decision of the Pennsylvania Commonwealth Court in *Scott v. Willis*, ___Pa. Cmwlth. ___, 543 A.2d 165 (1988).[5] *Scott* also involved a section 1983 claim against school officials arising out of the sexual assault of students by a teacher. However, in sharp contrast to the case at bar, the plaintiffs in *Scott*

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[5] The Pennsylvania Commonwealth Court acts as an intermediate level appellate court with jurisdiction of appeals from final orders of the courts of common pleas in cases involving, *inter alia*, local governmental bodies. *See* 42 Pa.Cons.Stat.Ann. §762 (Purdon Supp. 1988).

"totally failed to plead any policy or custom of the School District which could establish a causal nexus between the School District and the tragic assault upon" the students. 543 A.2d at 170. The plaintiffs also failed to plead "any facts to suggest that any of the [defendants] had notice of [the teacher's] dangerous proclivities."[6] *Id.* at 171.

The absence of notice to the school officials and of a policy or custom condoning the abuse clearly distinguish *Scott* from the instant case. Certainly, *Scott* does not stand for the proposition that school officials can tolerate the abuse of students by teachers. It, therefore, is not contrary to the decision of the Third Circuit in the case at bar.

D. The Third Circuit correctly applied the *Harlow v. Fitzgerald* standard for determining whether government officials are entitled to qualified immunity.

Government officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, ___U.S. ___, 107 S.Ct. 3034, 3039 (1987). Consistent with this principle, the Third Circuit requires "some but not precise correspondence" with applicable precedents, and demands that "officials apply, well developed legal principles." *Stoneking*, 856

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[6] The Pennsylvania Rules of Civil Procedure require that a claimant plead the material, or ultimate, facts supporting each element of her cause of action. *See* Pa.R.Civ.P. 1019(a).

F.2d at 599 (*quoting People of Three Mile Island v. Nuclear Regulatory Commissioners*, 747 F.2d 139, 144 (3d Cir. 1984)). *See also Prisco v. United States Dept. of Justice*, 851 F.2d 93, 96-97 (3d Cir. 1988); *Kovats v. Rutgers*, 822 F.2d 1303, 1313 (3d Cir. 1987).

Petitioners complain that the Third Circuit misapplied this standard in the present case because a general constitutional duty to protect students was not clearly established in 1979. However, Petitioners misstate the relevant period of inquiry and the underlying constitutional right involved in this case. While 1979 is significant because it marks the latest date on which Petitioners were on notice of Wright's misconduct and of his potential threat to students, the conduct of Petitioners challenged by Respondent involves much more than Petitioners' initial failure to respond to complaints of abuse.

The record before the Third Circuit was that Petitioners failed to report the various incidents of suspected sexual abuse of female band members by Wright; failed to adopt an effective policy or policies to prevent the sexual abuse of female students and to promptly report complaints of such abuse to appropriate authorities; failed to properly and vigorously investigate reports of sexual abuse by Wright of female band members; concealed from parents of female band members and public officials the various complaints and accusations that had been made against Wright since 1979; continued to permit Wright to function as band director despite actual notice that he presented a significant threat; and encouraged and perpetuated the custom and course of conduct at the high school whereby allegations of sexual abuse or mistreatment by Wright and other teachers were not

investigated and reported. *Stoneking*, 856 F.2d 596. Respondent alleges that these acts and omissions were pursuant to a policy of the School District that continued at least until 1983, when Respondent graduated from high school.

Petitioners' statement of the rights at issue in this case also misses the mark. The Third Circuit did not address whether school officials have a duty to protect students from unknown threats. Resolution of that broad issue was unnecessary. Rather, the court held that by 1979, two specific principles were clearly established: (1) individuals have a constitutionally protected liberty interest in being free from sexual abuse in school; and (2) where school officials know that a particular teacher presents a "special danger" to a known and identifiable group of students, the officials have a duty to investigate and take reasonable steps to protect the students and to eliminate rather than condone an atmosphere in which teachers could sexually harass students with impunity. *Stoneking*, 856 F.2d at 603.

As discussed above,[7] the first principle was clearly established no later than 1977, when this Court decided *Ingraham v. Wright*. The affirmative duty aspect of the second principle was clearly established in cases such as *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) and *Doe v. New York Dept. of Social Services*, 649 F.2d 134 (2d Cir. 1981). Finally, the duty of government officials with supervisory responsibility not to adopt or promote policies that authorize or condone misconduct by their subordinates was clearly established in cases such as *McClelland v. Facteau*,

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[7] See pages 5-6, supra.

610 F.2d 693 (10th Cir. 1979); *Sims v. Adams*, 537 F.2d 829 (5th Cir. 1976) and *Doe v. New York Dept. of Social Services*, 649 F.2d 134 (2d Cir. 1981).

In *Anderson v. Creighton*, ___U.S. at ___ , 107 S.Ct. at 3039, this Court emphasized that it is not the case that "an official action is protected by official immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in light of pre-existing law the unlawfulness must be apparent." Although they arose in different factual settings, the duty to act cases and supervisory responsibility cases cited above established the rights and principles necessary to place a reasonable school official on notice that his reckless disregard and condonation of the abuse of students by a teacher were unlawful. Petitioners required neither clairvoyance nor the advice of a constitutional scholar to apprise them in 1979 through 1983 that their conduct was unlawful.

CONCLUSION

WHEREFORE, Respondent prays that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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